



# THE INTERIM

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## LEGISLATIVE FINANCE COMMITTEE

The high cost of the 2006 fire season... The fire season started early this year in the western United States and continued into mid-September. Montana was no exception. The severe fire season has stressed fire crews and increased competition for fire resources, including retardant planes, hotshot crews, and specialty helicopters. As of Sept. 15, Montana had 2206 fires resulting in 845,542 acres being burned across all protection areas and all land ownership types. The fire season could have been much worse, but the Department of Natural Resources and Conservation posted a 96% initial attack rate in its protection areas. DNRC crews controlled 352 of 367 fires in its direct protection areas to ten acres or less. Initial attack is one of the best defenses against high-cost fires.

Severe fire seasons come with a high price tag. As of Sept. 14, total estimated fire costs were \$52.7 million, of which \$29.6 million are the responsibility of the state. The \$23 million difference is attributable to the financial support provided by the U.S. Forest Service and emergency payments from the Federal Emergency Management Agency. The final cost of the fire season will not be known until November after the DNRC sorts through the myriad of bills and settles up with federal agencies.

Probably the most significant statistic arising from this fire season is the impact the estimated cost has had on the average net cost to the state of a fire season. The Legislative Fiscal Division calculates average annual costs by analyzing the fire costs of the last seven years, removing the high and low seasons and dividing by five. Prior to this season, the average net cost to the state was about \$7 million a year. Given the estimated cost to date for FY 2007, the average net cost has risen to \$12.2 million a year, or \$24.4 million for the biennium. That average cost means that the governor's emergency fund of \$16 million for the biennium is insufficient to cover wildland fire suppression costs. The table below shows historic fire costs.

Average Cost of Fire Suppression			
Fiscal Year	Total Cost	Reimbursements	Net Cost
2001	\$54,925,104	\$44,784,017	\$10,141,087
2002	16,417,193	3,549,700	12,867,493
2003	6,710,688	4,684,927	2,025,761
2004	79,579,965	44,582,841	34,997,124
2005	3,969,096	989,945	2,979,151
2006	8,806,797	3,066,927	5,739,870
2007*	52,708,561	23,045,076	29,663,486
7 year averages	\$31,873,915	\$16,943,059	\$14,059,139
5 year adjusted averages	\$27,913,669	\$15,785,894	\$12,278,217

\*As of September 14, 2006

Why are this year's fires more costly to the state? One contributing factor is less federal assistance. During the 2000 fire season (FY 2001), Montana was provided blanket approval for financial assistance from the head of the FEMA after he toured the fires with Sen. Max Baucus. In FY 2004, the state received assistance based on the established criterion of 50 structures threatened by fire. For the current fire season, FEMA has raised that threshold to 100 homes. This change is a result of

## THE INTERIM

Montana Legislative Services Division  
Room 110, State Capitol  
PO Box 201706  
Helena, MT 59620-1706  
Phone: (406) 444-3064  
Fax: (406) 444-3036

**THE INTERIM** is a monthly newsletter that reports on the interim activities of legislative committees, including the Legislative Council, the Environmental Quality Council, the Legislative Finance Committee, the Legislative Audit Committee, and interim legislative committees and subcommittees staffed by the Legislative Services Division. Information about the committees, including meeting schedules, agendas, and reports, is found at <http://www.leg.mt.gov>. Follow the "Committees" link or the "Interims" link to the relevant committee. The newsletter is posted on the legislative branch website on the first of each month (follow the "Publications" link).

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FEMA standardizing threshold criteria across the nation. With these changes, Montana has so far qualified for FEMA assistance on three fires: the Saunders Fire, the Emerald Hills Fire, and the Derby Fire. The FEMA declarations are date and time sensitive, and when the fire season is over, the state and FEMA will settle up on fire costs. FEMA will reimburse Montana for 75 percent of eligible costs (the estimated reimbursements are included in the cost estimates in the table above).

As the season draws to a close, DNRC now faces the challenge of paying fire costs. The governor's emergency fund will provide the first \$13 million in cash and appropriation authority. The remaining \$39 million is available from the general fund ending balance. However, DNRC lacks the corresponding and needed appropriation authority. DNRC is working with the LFD and the governor's budget office to establish a plan to allow DNRC to pay fire bills and continue to operate until the 2007 Legislature convenes and can provide a supplemental appropriation for paying fire costs.

If you have questions regarding fire costs or the funding of fire suppression, contact Barbara Smith at basmith@mt.gov or (406) 444-5347.

Legislative Finance Committee schedules October meetings...The Legislative Finance Committee will meet Thursday, Oct. 12, and Friday, Oct. 13, in Room 102 of the Capitol. The meetings begin at 8 a.m. each day. The agenda and various reports will be available before the meeting on the Legislative Fiscal Division website at <http://www.leg.mt.gov/css/fiscal/lfc.asp>, or you can contact Clayton Schenck for more information at cschenck@mt.gov or (406) 444-2986.

The two day meeting tentatively includes the following topics:

- 2007 Biennium Budget Spending "Pressure Points"
- Fire Cost Report
- Fiscal 2006 General Fund Recap and Fiscal 2007 Outlook
- Montana Economic Outlook
- The "Big Picture Report"--LFD General Fund Preliminary Budget Outlook for the 2009 Biennium
- Highways Special Revenue Account Update
- Status of the Pension Plans Unfunded Liability: Work/Proposals of the State Administration and Veterans Affairs Interim Committee
- Review of Several LFC Bill Drafts
- K-12 Facility Conditions and Needs Assessment Criteria (Special Session requirement)
- Reliance on Federal Funds
- Report on Alternatives to Using Vacancy Savings Concept to Fund Personal Services
- Recap of Executive Action on FY 2006 Appropriations Transfer Requests
- Review of Select New Proposals Approved by the 2005 Legislature
- Budget Performance Measurement Standards and a Conceptual HB 2 Companion Bill

- Report of State Fund Budget for 2009 Biennium
- Information Technology Oversight
- Federal Deficit Reconciliation Act Changes/Potential Impacts
- DPHHS: New Initiatives in Early Intervention
- Reports on LFC-initiated interim activities

LFC to review committee bill drafts...the Legislative Finance Committee (LFC) will review draft legislation that has been developed during the interim for introduction in the 2007 legislative session. Legislation on the following topics is being considered:

- resource indemnity trust statute revisions as proposed by the RIT subcommittee;
- long-range building program statute revisions as proposed by the LRBP subcommittee;
- rainy day fund proposal;
- community college funding formula revision;
- LFC draft legislation to clarify emergency authority statutes regarding energy prices; and
- legislation recommended by the Law and Justice Interim Committee to adjust the entitlement share payments related to the Office of Public Defender for the 6 audited counties.

## ENVIRONMENTAL QUALITY COUNCIL

Council approves legislation, final reports...The Environmental Quality Council last month endorsed legislation that would revise wildland fire policy, implement a contract timber harvest program on state lands, provide funding for administration of public land managed for the university system, and provide landowners more notice of pending oil and gas drilling operations.

The council also approved reports from its three subcommittees and concluded its interim work. Summaries of the reports and proposed legislation the EQC approved include:

**State Superfund Study**--This study suggests improvements to the state superfund process stemming from concerns that state sites seriously affect communities and that the lack of timely superfund site cleanup exacerbates those community impacts.

While the report makes no legislative recommendations, it does suggest, among other things, that the Department of Environmental Quality establish benchmarks related to cleanup projects, that the agency hire outside consultants to perform routine functions, that the Legislature approve funding for project officers, and that the agency produce a guide to help citizens understand the superfund process.

The EQC also will ask the Legislative Audit Division to undertake a performance audit of the program.

**Financing the Administration of Montana's Trust Lands**--The study examines the legality of allowing the Department of Natural Resources and Conservation, which manages state trust lands mostly for the benefit of education, to use some earnings to pay administrative costs. The report concludes that the administrative costs of managing lands held in trust for the university system should be paid by a source other than trust revenues.

**Water Policy Issues**--Interim work included tracking the St. Mary's Canal Project, studying the interaction between surface water and ground water, and updating the water adjudication chronology. No legislation is proposed, but the EQC recommends that a work group continue to look at surface and groundwater connectivity.

**Contract Timber Harvesting**--A white paper assesses the feasibility of implementing contract logging as an additional marketing approach to selling timber on state trust lands. This involves selling timber--usually small trees that are less commercially viable--directly to loggers. The EQC proposes legislation that would allow the DNRC to conduct a contract timber harvest on up to 10 percent of the sustainable yield volume.

**Wildland Fire Policy**--A group of wildland fire professionals and others with an interest in fire policy reviewed current laws, considered a state fire policy, and discussed ways to deal with residential development in the wildland-urban interface. Five proposed bill drafts were approved by the EQC. Among other things, legislation would clarify that a person who starts a fire may have to pay for the costs of investigation and administration of suppression; restrict activity in high fire hazard areas; amend existing laws to produce a clearer state fire policy; allow cities and towns to be included in rural fire districts; and exempt the DNRC from the Montana Environmental Policy Act for the purpose of fire suppression activities.

**Split Estates and Coal Bed Methane Issues**--A panel of lawmakers and citizens studied split estates--when one party owns the surface and another owns the mineral rights--as well as issues related to coal bed methane development. Proposed legislation would increase from 10 days to 20 days the notice mineral developers give to surface owners. Also proposed is a requirement that surface owners be provided information on split estates and mineral development through dissemination of a brochure, a draft of which is also included in the report.

## MONTANA LEGISLATIVE REFERENCE CENTER

The law: calling all those who need help under-

standing it...As we all begin gearing up for the 2007 legislative session, don't forget to mark the date for the Law School for Legislators event to be held the morning of Jan. 4, 2007. This popular session is open to all legislators and provides an introduction to legal terminology, reasoning, and application. This information will help legislators as they go about their duties during the session.

Legal information available online...Like legislators, many of those not trained in the law need some legal instruction and direction now and then. To that end, the Montana Legal Services Association has developed a webpage called LiveHelp. LiveHelp allows MontanaLawHelp.org visitors to ask for help finding online legal information and resources. Just click on the "LiveHelp" button on the right side of any page on MontanaLawHelp.org to begin. You will be connected with a MontanaLawHelp.org website specialist. Type your question into a box and click the send button. Your question is sent immediately to the website specialist, who provides a quick response on the location of the information that answers your question.

LiveHelp is available Monday through Wednesday from 8 a.m. to 4 p.m. and Thursday from noon to 4 p.m. When LiveHelp is not available, you can still ask for help. Click the LiveHelp button and send a message with your email address and question. A MontanaLawHelp.org specialist will email you the information in one or two business days.

MontanaLawHelp.org is a project of the Montana Legal Services Association, the State Bar of Montana, the Montana Supreme Court Equal Justice Task Force, and Montana's Credit Unions. LiveHelp is sponsored by the Montana Legal Services Association under a grant from the Legal Services Corporation. For more information about LiveHelp, see: [www.montanalawhelp.org/link.cfm?1477](http://www.montanalawhelp.org/link.cfm?1477).

Recent information and forms on LiveHelp...The following topics have recently been made available on the LiveHelp webpage:

### American Indian issues

Common Questions About Trust Land and Writing Your Own Will--<http://www.montanalawhelp.org/link.cfm?1561>

Why You Need a Will--<http://www.montanalawhelp.org/link.cfm?1560>

Understanding the American Indian Probate Reform Act--<http://www.montanalawhelp.org/link.cfm?1562>

The American Indian Probate Reform Act (Public Law 108-374)--<http://www.montanalawhelp.org/link.cfm?1563>

### Domestic/sexual/dating violence and stalking

What is a No Contact Order?--<http://www.montanalawhelp.org/link.cfm?1558>

For Survivors: Keeping Information About You Confidential--<http://www.montanalawhelp.org/link.cfm?1559>

### Employment

Federal Employment Law Guide--<http://www.montanalawhelp.org/link.cfm?1569>

Employee Rights: Frequently Asked Questions--<http://www.montanalawhelp.org/link.cfm?1565>

### Senior citizens

Long Term Care Insurance--<http://www.montanalawhelp.org/link.cfm?1566>

Medicare Mistakes, Abuse, & Fraud: Help to Identify Billing Problems--<http://www.montanalawhelp.org/link.cfm?1567>

"Now I can sleep better" fact...The Montana Credit Union Network (MCUN) is adding information about Montana credit unions onto MontanaLawHelp.org. Website viewers now have easy access to information about their local credit unions, including consumer education programs. Information on approximately 62 credit unions has been added so far.

If you have questions or concerns regarding MontanaLawHelp.org, send an email [montanalawhelp@mtlsa.org](mailto:montanalawhelp@mtlsa.org). If you have questions about law or legal research in general, please contact Lisa Mecklenberg Jackson, legislative librarian, at [Ljackson@mt.gov](mailto:Ljackson@mt.gov) or (406) 444-2957.

## CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Final Meeting and Recommendations...The Children, Families, Health, and Human Services Committee met for the last time this interim Sept. 11 and 12. The committee completed its interim duties of administrative rule review, agency monitoring, and interim studies; it also made several final recommendations.

Administrative Rules...The committee requested a bill draft to clarify the Montana Administrative Procedures Act. Under current law, a state agency must notify the legislative sponsor that it is working on rules to implement new statutes. The committee proposal would require that a state agency notify the sponsor of amendments to existing law of rule changes implementing the amendatory language. The notice requirement would apply on a program-by-program basis.

SJR 37 Study on Child Protective Services...The committee requested four pieces of legislation related to grandparents or other caretaker relatives raising grandchildren. Three of the drafts would provide grandparents a legal process by which they could enroll their grandchildren in school (LC0448), give consent for medical care (LC0447), and have limited standing as caretaker

relatives in certain cases when they are responsible for child relatives (LC0443). A fourth draft would clarify statutes on grandparent and grandchild contact based on the Montana Supreme Court decision in Polasek.

The committee considered a bill draft on a Child Protective Services Statute Revision Commission but decided not to pursue it. The committee did, however, express support for an alternative proposal by Sen. Carol Williams that would make specific changes to the statutes regarding discovery and other legal processes involved in child protective services.

Finally, the committee requested a bill draft that would require the Department of Public Health and Human Services to provide liability insurance for personal injury and property damage for a licensed foster parent or a foster parent providing therapeutic foster care services under the auspices of a licensed child-placing agency for youth under 18 years of age who are placed with a foster parent by a state agency (LC0440).

SJR 41 study of the mental health crisis...The committee requested a bill draft to include licensed psychologists in the statutory definition of "certified professional persons" for the purposes of involuntary commitments. The committee also requested a bill draft to amend the behavioral health inpatient facility statutes to allow for secure, nonhospital evaluation and treatment.

Other legislation and findings...The committee requested a bill draft that would expand CHIP eligibility up to 165% of the federal poverty level (LC0439) and a bill draft that would allow the long-term care and local ombudsmen access to long-term care facilities at any time.

As part of its statutory duties, the committee reviewed and submitted agency bill draft requests on the behalf of the Department of Public Health and Human Services.

The committee made a finding that applauds the governor office's recognition of the importance of treatment in the DPHHS budget and that the money should follow the person in 72-hour presumptive eligibility for mental health crisis services.

The committee also applauded the Supreme Court forum on protecting children and recommended legislator participation in small group discussions with all of the various parties that are involved with child protective services.

The committee supported the concepts contained in the Drug-Endangered Children Committee's proposed legislation that would include the exposure of children to methamphetamine in the child endangerment laws.

The committee recognized the high suicide rate in Montana and supported doing more work on suicide prevention in the state.

The committee also asked that DPHHS acknowledge the needs of those persons who are working toward recovery and to find solutions to the eligibility "cliffs" that people experience as they move toward economic stability.

Committee proposals and bill drafts will be posted to the committee's website. For more information, contact Susan Byorth Fox at [sfox@mt.gov](mailto:sfox@mt.gov) or (406) 444-3066.

## ECONOMIC AFFAIRS COMMITTEE

The world is its oyster...The Economic Affairs Committee may have appeared to step outside its boundaries by bringing a health care reform advocate, Dr. Henry Simmons of the National Coalition on Health Care, to speak at its last interim meeting in September. Dr. Simmons used the opportunity to point out that the economic health of pension funds, businesses, and employees all are linked to dealing with the rising costs of health care. The National Coalition on Health Care is a nonpartisan organization seeking multi-targeted reforms aimed at providing a basic package of health care to all Americans combined with some kind of payment mechanism, administrative reforms, and national guidelines to improve the quality of health care.

Dr. Simmons' talk resulted in the committee voting to send letters to Montana's congressional delegation urging attention to health care reforms and to draft a joint resolution, LC0487, for the same purpose. Dr. Simmons' talk is on the Sept. 11 audio minutes, available on the committee's website.

More precious than pearls...A good name and a reputable credit score are among the expected benefits of the committee's SJR 38 interim study of identity theft, which resulted in the following committee-sponsored bill drafts:

- LC0450 (formerly LC8888)--allowing consumers to put a freeze on their credit reports;
- LC0451 (formerly LC8877)--providing various assistance to ID theft victims;
- LC0453 (formerly LC9894)--funding consumer education on ID theft;
- LC0454 (formerly LC7800)--requiring government policies on social security numbers and notification of computer security breaches that affect personal information.

And other gems...The committee also finished work on the SJR 35 interim study of professional and occupational licensing boards. Committee-sponsored bill drafts for SJR 35 are:

- LC0485 (formerly LC9831)--a general revision of licensing boards, including the repeal the athletic agent program and changing the Board of Athletics to a program that would, in addition to boxing and wrestling, include other competitive events, such as martial arts; and

- LC486 (formerly LC7799)--a sunrise and review policy for new and existing licensing boards.

Other bill drafts requested by the committee included:

- LC0488 (formerly LC9893) to fund the Montana Equity Capital Investment Board;
- LC0452, at the request of the Rail Services Competition Council, to attach the council to the Department of Transportation for administrative purposes and to deal with changes in membership, among other provisions.
- LC0548, at the request of the Governor's Office of Economic Development, to revise laws regarding the State-Tribal Economic Development Commission.

The committee also requested the drafting of legislative proposals on behalf of the Montana State Fund; the State Auditor's Office; and the Departments of Livestock, Commerce, and Labor and Industry.

The Montana Economic Developers Association presented its legislative wish list. Paul Clark discussed the final report, including legislative recommendations, from the Private Alternative Adolescent Residential or Outdoor Programs.

Information available...Committee minutes and meeting materials are available on the committee's webpage, or you may contact committee staff: Pat Murdo, Bart Campbell, or Dawn Field at (406) 444-3064.

## ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee approves white paper, bill drafts...The Energy and Telecommunications Interim Committee held its final meeting of the interim on Sept. 7.

Evan Barrett of the Office of Economic Opportunity discussed the governor's energy initiatives, and Greg Jergeson, chair of the Montana Public Service Commission, reported on the activities of the commission.

The committee approved a staff white paper on distributive energy generation and approved the following committee bills:

- LC0038--establishing a state energy transmission and transportation authority (as amended). Vote: 7 for, 1 against. Sponsor will be Rep. Alan Olson.
- LC0039 (formerly LC4144)--revising telecommunications laws. Vote: 6 for, 2 against. Sponsor yet to be decided.
- LC0188--authorizing wireless enhanced 9-1-1. Vote: 8 for, 0 against. Sponsor will be Rep. Robyn Driscoll.

- LC0089--providing a property tax exemption for equipment used to capture, reuse, or sequester carbon. Vote: 8 for, 0 against. Sponsor will be Sen. Greg Lind.
- LC0090--providing common carrier status to pipelines that transport carbon dioxide (as amended). Vote: 8 for, 0 against. Sponsor will be Rep. Harry Klock.
- LC0170 (formerly LC0037)--revising electric industry restructuring laws (as amended). Vote: 8 for, 0 against. Sponsor will be Sen. Joe Tropila.

For more information about the Energy and Telecommunications Committee, contact Casey Barrs, committee staff, at (406) 444-3957 or cbarrs@mt.gov.

## STATE-TRIBAL RELATIONS COMMITTEE

Not over 'til it's over...The State-Tribal Relations Committee, which expected a July meeting to be its last of the interim, decided to have its final meeting instead Aug. 28. At that meeting the committee reviewed various proposals and approved two bill drafts as committee-sponsored legislation. These were:

- LC0346 (drafted as LC 9998)--revising 2-15-143, MCA, a statute related to interactions between state employees and tribes as well as state-tribal discussions about policies affecting tribal governments and tribal populations; and
- LC0356 (drafted as LC 9997)--delegating authority to the governor to negotiate Class III gaming compacts for play exclusively on Indian lands for the exclusive economic benefit of Montana Indian tribes.

For more information...The committee's final report, written by Connie Erickson before her retirement, will be available electronically on the committee's webpage. Other information is available from Eddy McClure, committee staff, or Dawn Field at 444-3064.

## LEGISLATIVE COUNCIL

Council gears up for the session...The Legislative Council met on Sept. 15 and adopted the Legislative Computer System Plan and the Legislative Services Division budget for the next two fiscal years that will be presented to the 2007 Legislature.

The Council adopted the prices for the 2007 Montana Code Annotated and related publications and the prices for the 2007 session proceedings. Both will be available on-line. Prices are slightly higher than in the past; publications will be available in full sets or by specific

publication. For more information visit the "Publications" page on the legislative branch website.

Council approves bill drafts...The council approved nine bill drafts and selected sponsors for the following legislation:

- clarifying motor vehicle registration fees (LC0073);
- revising laws governing the Legislature (LC0134);
- revising fiscal note laws (LC0135);
- the code commissioner bill (LC0136);
- revising travel reimbursement for legislators (LC0138);
- changing the deadline for submission of legislative budget (LC0139);
- revising the optional retirement system membership requirement for temporary legislative session staff (LC0140); and
- updating Titles 1-7, MCA, by using gender-neutral terms and by conforming language to the Bill Drafting Manual (LC0141).

The bill drafts will be posted to the Legislative Council webpage. For more information, contact Susan Byorth Fox, (406) 444-3066 or sfox@mt.gov.

## DEMONSTRATION OF "LAWS" TO BE OFFERED

Demonstration of legislative branch automated system...The next regular session of the Montana Legislature will begin Wednesday, Jan. 3, 2007. Sometime before the start of the session, the Legislative Services Division will offer demonstrations of the Legislative Automated Workflow System (LAWS) to both state agencies and the public. LAWS provides Internet access to legislative information before, during, and after a session, including up-to-date bill status, bill text, hearing schedules, agendas, journals, information on legislators, and more.

Although dates have not been set, the demonstrations are expected to be offered in November and December before the session.

Next month's Interim newsletter will give the scheduled days and times.

## LAW AND JUSTICE COMMITTEE

Committee recommends legislation...At its final meeting on Aug. 31, the Law and Justice Interim Committee made its final recommendations, including the following three committee bills:

- LC0071: Revising the funding of county attorney salaries and a statutory appropriation for the state's obligation to share the costs; and providing a general appropriation to enhance forensic and

prosecution services provided by the Department of Justice.

- LC0072: Establishing a self-help law program administered by the Supreme Court to help Montanans and self-represented litigants access legal resources in civil legal matters, such as in landlord tenant disputes, divorce, employment and labor law, consumer protection, and other civil legal matters.
- LC0359: Adjusting the funding in Yellowstone, Gallatin, Lewis and Clark, Missoula, Cascade, and Flathead counties for the statewide public defender system.

These bills will be preintroduced by request of the LJIC. For more information about the committee, please go to the LJIC webpage accessible through <http://leg.mt.gov> or contact Sheri Heffelfinger, committee staff, at (406) 444-3596.

## REVENUE AND TRANSPORTATION COMMITTEE

Committee reschedules revenue estimating meeting...The Revenue and Transportation Committee rescheduled its Nov. 14 meeting to Nov. 15. The primary purpose of the meeting will be to adopt revenue estimates for the 2007 legislative session. Section 5-5-227, MCA, directs the committee to prepare "by December 1 for introduction during each regular session of the legislature . . . an estimate of the amount of revenue projected to be available for legislative appropriation."

Committee meets in September...At the committee's Sept. 8 meeting, Terry Johnson, principal fiscal analyst,

Legislative Fiscal Division, reported on the fiscal year 2006 preliminary general fund ending fund balance. According to Johnson, the fiscal year 2006 unaudited general fund ending fund balance is \$422.9 million, or \$195 million more than estimated by the Legislature during the December 2005 special session. The primary reasons for the larger fund balance include higher than expected revenue collections and lower than expected disbursements. Johnson told the committee that the 2007 biennium ending fund balance could be as high as \$525 million. Actual revenue collections, supplemental appropriations, reversions and adjustments, and federal legislation that occur between now and the end of the biennium all could affect the ending fund balance.

The committee reviewed Department of Revenue proposed rules dealing with the determination of whether certain little cigars should be taxed as cigarettes rather than as other tobacco products. Under current law, cigarettes are taxed at \$1.70 a pack and other tobacco products are taxed at 50 percent of the wholesale price. Kelly O'Sullivan, assistant attorney general, discussed a petition brought by the attorneys general in several states asking the federal Alcohol Tobacco Tax and Trade Bureau to revise its rules regarding the definitions of cigarettes and cigars. Federal rules allow a manufacturer to decide whether its product is a cigarette or cigar. A motion in the committee urging the Department of Revenue to delay implementation of the rules until after the next Legislature could deal with the issue was defeated by a vote of 5 to 7.

The committee voted to request the drafting of Department of Revenue and Department of Transportation legislative proposals. Summaries of the departments' proposals are available on the committee's webpage.

For more information about the committee, contact Jeff Martin, committee staff, at (406) 444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov).

## THE BACK PAGE

### A FLOOD STORY

By Joe Kolman  
Legislative Research Analyst

#### INTRODUCTION

Be it the Big Hole or the Bitterroot, the Yellowstone or the Yaak, riverfront property commands some of the highest real estate prices in Montana.

Glossy magazines that extol the virtues of the state prominently feature advertisements for river frontage. For just \$2 million, one can buy an entire island in the Missouri River near Fort Benton.<sup>1</sup>

But the building of homes and other structures on those desirable parcels--many of which may be within floodplains--is a contentious issue in Montana.

"We're seeing a huge demand," said Karl Christians, who until earlier this year served as the state's floodplain program manager for 15 years. "It's really getting hectic and controversial on so many projects."<sup>2</sup>

An analysis by the Legislative Services Division (LSD) found there could be several thousand homes and other structures built in the floodplains of Montana's rivers and streams. And a portion of those structures are probably not insured against flooding.<sup>3</sup>

Uninsured properties that flood may end up costing taxpayers in the form of disaster relief. And some structures built in floodplains--insured or not--may have detrimental environmental and economic effects, including increasing the chances of flooding on other properties.

People have long been drawn to water. Historically, the driving forces were access to a drinking supply, power

generation, and transportation of goods. Farmers took advantage of irrigation water and soil made rich by years of sediment deposited by flooding.<sup>4</sup>

For these reasons and more, many Montana communities formed along the state's vast river system. Now, development along state waters is driven less by necessity and more by the desire to be near beauty and recreation.

The LSD analysis of property in 17 counties found that since 1990, more than 400 homes have been built in floodplains--defined as places where there is an annual 1 percent chance of flooding. The value of those homes, not including the land, is close to \$62 million.<sup>5</sup>

Flathead County saw the most residential floodplain construction in that period, with 169 homes valued at nearly \$32 million. Other fast-growing, western Montana counties have seen significant floodplain construction too. But homes also are being built in floodplains in counties less popular with tourists and second home buyers. Almost 150 homes were built in Cascade County's floodplain in that period and a handful more have been built in Custer, Dawson, Musselshell, and Richland counties.

Of the new homes, some are trophy models. One is valued at nearly \$2 million, two others are worth more than \$1 million and 68 are worth more than a quarter million dollars. The median building value is about \$129,000.<sup>6</sup>

Those newer homes add to an existing inventory of houses that may be damaged or destroyed by nature's watery whim. The examination found that dating back to homes built in the 1800s in those 17 counties, there are 3,800 structures valued at more than \$257 million within floodplains.

For a list of homes and values by county see Fig. 1 on the next page.

State legislation that would have limited floodplain development failed in 2005, but new proposals are likely to be heard during the 2007 legislative session. At a national level, the effects of Hurricane Katrina, including the bankrupting of the National Flood Insurance Program, also

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<sup>1</sup> Montana Magazine May-June 2006 Issue, p. 131.

<sup>2</sup> Karl Christians, interview, 5/16/2006.

<sup>3</sup> Construction permits for floodplains are issued by local governments, which are supposed to forward copies to the state floodplain office. However, those files can be incomplete and it would be a laborious process to sift through paper files and convert them into electronic records in order to perform the type of analysis done here. For this analysis, LSD used state cadastral data, which shows individual parcels, and floodplain maps. By using mapping software, the analysis found parcels within each floodplain. Estimating the number of homes and other structures statewide built in floodplains is difficult; mainly because most federal floodplain maps are old (many date from the 1970s and 1980s). Electronic versions of those maps also are outdated and only available for a handful of counties. The analysis made use of the uniform federal electronic floodplain maps that are available. The analysis also examined existing flood insurance policies in Montana. It is safe to assume that many of those policies have been issued to properties within 100-year floodplains.

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<sup>4</sup> Managing Floodplain Development Through the National Flood Insurance Program. [http://dnrc.mt.gov/wrd/water\\_op/floodplain/default.asp](http://dnrc.mt.gov/wrd/water_op/floodplain/default.asp)

<sup>5</sup> While most counties have paper floodplain maps, electronic maps from the federal government are available for only 18 of the state's 56 counties. (One county showed no homes in the floodplains). These maps were used for this analysis. To be as conservative as possible, the analysis counted only parcels that were completely contained within the floodplain. For example, if only 19.9 acres of a 20 acre parcel were within a floodplain, it was *not* counted. Only residential parcels included the date the house was built, so the analysis includes only homes, not businesses and other structures.

<sup>6</sup> Values are not available for all homes, including those built in 2005. The median includes only those with values.



may result in changes that could affect Montana.

Figure 1: Number and Value of Homes in Floodplains

County	Homes in 100-year floodplain *	Value (building only)
Cascade	1,192	\$ 92,484,902
Yellowstone	96	8,234,376
Flathead	659	74,634,074
Carbon	51	2,591,189
Ravalli	32	2,929,368
Custer	825	28,789,539
Dawson	37	1,577,956
Mussellshell	176	5,025,285
Richland	25	1,118,080
Deer Lodge	15	686,143
Treasure	7	123,210
Sanders	69	1,560,333
Sweet Grass	4	243,670
Broadwater	12	504,980
Wheatland	11	266,225
Park	410	26,960,111
Lincoln	179	9,290,468
<b>Total</b>	<b>3,800</b>	<b>\$257,019,909</b>

\*The number of homes in the floodplain and their values should be taken with at least one grain of salt, probably more. They are based on an analysis of the best available data. That said, some of the data are not the best. Floodplain maps are in most cases at least a decade old and available electronically for only select counties. (Updating maps takes time and lots of money). Experts caution against using them for regulatory decisions, such as issuing permits. The analysis does not purport to be exact. It is intended to provide an overall impression of development within flood prone areas.

The management of flood prone lands spans all levels of government and involves several complex issues.

Dating back nearly a century, the federal government tried to control rivers, but, after many failures, turned more toward encouraging land management to reduce damage risks. States and local governments--which are much more attuned to local needs and conditions--now play a large part in floodplain management. All levels of government deal with three main issues when it comes to regulating, or not regulating, development near rivers: Private property rights, environmental effects, and economic impacts.

### FLOOD MANAGEMENT HISTORY

For as long as people have yearned to live by rivers, there have been flood fears. Starting in the early 1900s, federal agencies built levees, floodways, reservoirs and other costly physical structures.

"These efforts often succeeded only in exacerbating flood damages elsewhere while creating a false sense of security in the protected areas that encouraged building in the floodplain," according to a law review article. "Development typically outpaced construction of flood protection, further

increasing damages. The government's efforts aimed at restraining the floodwaters also destroyed or endangered valuable ecosystems."<sup>7</sup>

Despite spending billions of dollars on flood control projects, the loss of life and property continued to rise. So did the cost to taxpayers who lived far away from the reaches of floods.<sup>8</sup> When homes and businesses were flooded, the owners turned to the government for help in the form of disaster relief. President Harry Truman proposed a national flood insurance program in the 1950s after massive flooding in the Midwest, but was rebuffed.

By the 1960s, it became even clearer that riding herd on rivers cost billions of dollars, yet failed to staunch flood losses.<sup>9</sup>

Congress again debated a government-backed flood insurance program--mostly because private insurance companies didn't want to take on the risk of flood insurance.

Living in a 100-year-floodplain may sound like a dry bet. But in such an area, a home has a 26 percent chance of being damaged by a flood during the course of a 30-year mortgage. The same home has only a 9 percent chance of being destroyed by fire.<sup>10</sup>

The so-called 100-year flood is often inaccurately explained as an occurrence that happens once every hundred years. In reality, it is a flood that has a 1 percent chance of occurring in any given year. About a decade ago, the residents of Park County were hit by two such floods in consecutive years.

To further make the deal unattractive to insurance companies, only the people who live in or very near a flood zone are likely to buy flood insurance. In the case of fire insurance, no matter where you live, you are likely to insure yourself against flames. Since most homes don't burn, the insurance company makes money off that bet.

Obviously, those most likely to buy flood insurance also are those whose property will most likely be flooded. That means the risk cannot be spread out among those who likely will never file a claim.<sup>11</sup>

<sup>7</sup> The National Flood Insurance Program: Unattained Purposes, Liability in Contract and Takings. William and Mary Law Review, Winter 1994.

<sup>8</sup> National Flood Insurance Program, Program Description, 2002. Federal Emergency Management Agency.

<sup>9</sup> Ibid.

<sup>10</sup> <http://www.floodsmart.gov>. Flood Statistics from the NFIP.

<sup>11</sup> National Flood Insurance Program, Program Description, 2002. Federal Emergency Management Agency.

Therefore, government took on the problem, creating the National Flood Insurance Program in 1968. But even though the insurance was subsidized, there weren't many takers. In 1973, amendments forbid any government assistance or loans for buildings in floodplains unless insurance was purchased. Furthermore, insurance would only be offered to those who lived in communities with regulations restricting some forms of development in the floodplain.<sup>12</sup>

#### WHY IS FLOODPLAIN DEVELOPMENT REGULATED?

According to Montana law:

"Recurrent flooding of a portion of the state's land resources causes loss of life, damage to property, disruption of commerce and governmental services, and unsanitary conditions; all of which are detrimental to the health, safety, welfare, and property of the occupants of flooded lands and the people of this state."<sup>13</sup>

Federal law encourages state and local governments to "constrict the development" of flood prone areas.<sup>14</sup> Montana law states:

"The public interest necessitates management and regulation of flood-prone lands and waters in a manner consistent with sound land and water use management practices which will prevent and alleviate flooding threats to life and health and reduce private and public economic losses."<sup>15</sup>

Despite laws and widely-available flood insurance, floodplain problems continue to mount, especially in the wake of Hurricane Katrina.

After nearly 40 years of government-backed flood insurance, it is estimated that only about half of the homes in flood zones nationwide have coverage. Rural areas may be underinsured because insurance agents in those parts of the country could be less familiar with the national program.<sup>16</sup>

Uninsured property owners hit by Hurricane Katrina are due to receive more than \$80 billion to help offset losses.<sup>17</sup>

And taxpayers in landlocked states will likely end up paying even for those on the Gulf Coast who did have flood insurance: The National Flood Insurance Program will borrow more than \$20 billion from the U.S. Treasury to pay policy holders and there is little hope that money will be paid back.<sup>18</sup>

"You've got people living in dry areas paying for people who want to keep living in wet ones," said Rep. Candice S. Miller of Michigan. "They're sticking it to us, and I don't like to be stuck."<sup>19</sup>

While limited data makes it difficult to estimate how many Montana homes in floodplains are without insurance, one can compare the number of active flood insurance policies to the results of the Legislative Services Division analysis. In just the 17 counties examined, there are an estimated 3,800 homes within floodplains. Statewide, there are only about 3,200 insurance policies for homes and businesses.<sup>20</sup>

Flood losses in Montana--more than \$5.3 million since 1978--pale in comparison to other states, especially those on the coasts. For a listing of polices and historical flood losses by county, see Fig. 2 nearby.<sup>21</sup>

But with a broke flood insurance program, any flooding in Montana could affect taxpayers.

Left to its own devices, nature has a cost-effective way of dealing with floods. A Department of Natural Resources and Conservation document on managing floodplains includes information on beneficial floodplain functions.

A floodplain free of riprap, dykes, and buildings allows floodwaters to slow down as they spread out. Sediments settle and water quality is further improved as vegetation filters out impurities and excess nutrients.<sup>22</sup> Floodplains also provide havens for plants and support a diverse ecosystem.

<sup>12</sup> Conflict at the Confluence: The Struggle Over Federal Floodplain Management. North Dakota Law Review, 1998.

<sup>13</sup> 76-5-101, MCA.

<sup>14</sup> 42 U.S.C. 4001.

<sup>15</sup> 76-5-101, MCA.

<sup>16</sup> The National Flood Insurance Program's Market Penetration Rate. RAND Corp., 2006. [http://rand.org/pubs/technical\\_reports/TR300/](http://rand.org/pubs/technical_reports/TR300/)

<sup>17</sup> National Flood Insurance Program: Treasury Borrowing in the Aftermath of Hurricane Katrina; Congressional Research Service, June 2006.

<sup>18</sup> Ibid.

<sup>19</sup> "Politics Stalls Plan to Bolster Flood Insurance," New York Times, 5/15/2006.

<sup>20</sup> NFIP statistics as of 2/28/2006.

<sup>21</sup> Claims through February 2006. For updated information: <http://bsa.nfipstat.com/>

<sup>22</sup> Managing Floodplain Development Through the National Flood Insurance Program. [http://dnrc.mt.gov/wrd/water\\_op/floodplain/default.asp](http://dnrc.mt.gov/wrd/water_op/floodplain/default.asp)

Fig. 2: Flood Insurance Policies and Historical Insurance Claims			
	Current Policies*	Coverage	Total Losses 1978-2006
<b>Montana</b>	<b>3,181</b>	<b>\$433,241,700</b>	<b>\$ 5,314,194</b>
Cascade	474	70,716,000	309,736
Custer	365	27,297,500	256,436
Gallatin	289	40,963,500	165,755
Flathead	252	49,034,300	221,791
Missoula	228	39,202,900	356,558
Park	186	24,265,500	707,583
Lewis & Clark	153	18,995,900	143,561
Yellowstone	139	24,025,200	589,455
Ravalli	104	23,175,300	55,161
Valley	82	6,750,500	465,200
Lincoln	70	12,204,800	374,118
Carbon	68	11,509,800	148,498
Blaine	56	3,699,500	63,069
Phillips	54	2,650,300	129,327
Stillwater	52	9,039,900	22,006
Beaverhead	49	6,000,100	2,464
Powell	49	3,947,400	37,576
Teton	43	4,288,500	1,426
Glacier	37	2,008,800	20,415
Sanders	36	4,236,100	222,301
Mineral	29	4,756,700	10,767
Fergus	28	5,252,100	47,552
Musselshell	28	1,653,400	217,306
Lake	27	5,938,900	53,319
Jefferson	25	2,736,200	1,407
Powder River	25	1,322,000	34,429
Richland	24	2,380,200	4,897
Madison	23	5,695,800	13,068
Dawson	21	1,913,000	7,876
Liberty	20	1,140,900	789
Butte-Silver Bow	19	2,254,100	-
Meagher	16	1,581,800	91,551
Granite	16	1,555,900	36,232
Big Horn	13	2,639,300	35,613
Wibaux	12	385,100	4,837
Sweet Grass	10	2,762,900	378,111
Wheatland	10	831,100	16,474
Anaconda-Deer Lodge	9	857,400	4,094
Pondera	7	313,100	-
Hill	6	846,400	4,094
Broadwater	5	726,200	13,604
Roosevelt	5	364,800	10,507
Fallon	5	282,500	-
Golden Valley	4	335,600	-
Treasure	4	185,500	27,597
Chouteau	2	455,000	-
McCone	1	50,000	-
Rosebud	1	14,000	7,634

\* Includes homes and businesses. Figures are current through February 2006.  
Updated data: <http://bsa.nfipstat.com/>

They are prime feeding and breeding grounds for many types of fish, waterfowl and other wildlife. Many of the aesthetic and recreational opportunities that draw people to rivers can only be preserved by open floodplains.<sup>23</sup>

And while limiting the use of floodplains may have economic impacts on those who would build there, using floodplains for such things as parks, open space, and conservation areas can make regions attractive to potential employers, investors, residents, property owners and tourists.<sup>24</sup>

#### HOW ARE MONTANA FLOODPLAINS MANAGED?

Neither federal nor state law anticipates that all man-made uses of floodplains should be banned. In carrying out regulations that limits such development, it is the policy of the state to, "insofar as possible, balance the greatest public good with the least private injury."<sup>25</sup>

Montana law allows specific uses in the floodplain and the floodway, which is the channel of a watercourse and adjoining land reasonably required to carry floodwaters. The floodway is contained within the floodplain.

In floodways, the following uses are allowed provided they do not require permanent structures, fill, or permanent storage of materials or equipment and are not forbidden by any other regulation:<sup>26</sup>

- (1) agricultural uses;
- (2) industrial-commercial uses such as loading areas, parking areas, or emergency landing strips;
- (3) private and public recreational uses such as golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, boat launching ramps, swimming areas, parks, wildlife management and natural areas, alternative livestock ranches, fish hatcheries, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, or hiking and horseback riding trails;
- (4) forestry, including processing of forest products with portable equipment;
- (5) residential uses such as lawns, gardens, parking areas, and play areas;
- (6) excavations subject to the issuance of a variance permit.

Outside of the floodway, but within the floodplain, state law requires permits for the following uses, subject to other regulations:<sup>27</sup>

- (1) any use permitted in the designated floodway;
- (2) structures, including but not limited to residential, commercial, and industrial structures, provided that:

(a) the structures meet the minimum standards adopted by the department;

(b) residential structures are constructed on fill such that the lowest floor elevation (including basements) is 2 feet above the 100-year flood elevation;

(c) commercial and industrial structures are either constructed on fill as specified in subsection (2)(b) or are adequately floodproofed up to an elevation no lower than 2 feet above the 100-year flood elevation. The flood proofing must be in accordance with the minimum standards adopted by the department.

Building the structures two feet above the base flood elevation is one way state law differs from federal regulations, which only require that the bottom floor be equal to the elevation of the base flood.<sup>28</sup>

In Montana, floodplain regulations are administered by local governments.<sup>29</sup>

Some Montana counties have gone beyond what is required by state law. The most popular regulation appears to be the setback--restricting development within a certain distance of a river or stream. A proposal for a statewide, minimum setback failed in the 2005 Legislature. At least 25 states, including New Mexico and Oregon in the West, have statewide setback regulations.<sup>30</sup>

Some examples of setback regulations in Montana counties include:

- On lots created after the setback ordinance was enacted, Gallatin County prohibits structures within 300 feet of rivers and 150 feet of streams.<sup>31</sup>
- Choteau County mandates that along a portion of the Missouri River, new residential development must be set back at least three miles on either side of the channel if the structure would be visible from the high water mark. On another portion of the Mighty Mo', new homes must be at least 400 feet back.<sup>32</sup>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> 76-5-102; MCA.

<sup>26</sup> 76-5-401, MCA.

<sup>27</sup> 76-5-402, MCA.

<sup>28</sup> Karl Christians, interview, 5/16/2006.

<sup>29</sup> Title 76, chapter 5, part 3, MCA.

<sup>30</sup> Floodplain Management, 2003. Association of State Floodplain Managers. [www.floods.org](http://www.floods.org)

<sup>31</sup> Bozeman Daily Chronicle, 3/3/2005.

<sup>32</sup> <http://www.co.chouteau.mt.us/CountyDev%20Reg.pdf>

- In Madison County, the minimum construction setback from the Madison River is 500 feet. A minimum setback of 150 feet is required on the Big Hole River, the Jefferson River, the Ruby River, the Beaverhead River, and the South Boulder River.<sup>33</sup>

### OTHER MANAGEMENT STRATEGIES

According to a 2003 report from the Association of State Floodplain Managers on other state-level regulations that may reduce flood losses and protect floodplain resources, there are:

- 32 states with stormwater management or detention requirements. Runoff is stored and released after a storm subsides or the water is used for irrigation or groundwater recharge.
- 19 states, including Montana, with statewide floodway encroachment regulations.
- 22 states, including Montana, that require new buildings to be elevated higher than the 100 year flood.
- 9 states mandating compensatory storage. That requires those who build in the flood area--taking away land that could be used to store flood waters--to compensate for that lost land with storage elsewhere.
- 8 states requiring the maintenance of drainage systems.
- 9 states mandating that critical facilities such as power plants, hospitals, and water treatment facilities to be outside of at least the 100 year floodplain. Some go as far as banning them to beyond the 500 year floodplain.

The state floodplain managers also offer these strategies that could be adopted by local governments:

- Expand regulation of activities from the 100-year-floodplain to the 500-year-floodplain.
- Prohibit residences in floodplains.
- Prohibit activities that would cause any substantial increase in flood heights.
- Establish restrictions on the use of septic tanks and absorption fields in floodplains.

- Create open space zoning for floodplains.
- Restrict the rebuilding of non-conforming uses.

In addition to regulations, the association reports that 12 states use tax incentives to encourage the preservation of floodplains as open space. Property owners may pay reduced income or property tax if the land is left undeveloped.

As an overall strategy, the floodplain managers association advocates a “no adverse impact” approach. The strategy isn’t designed as a rigid rule, the group says. It would not permit land and water uses that would “flood new areas, increase flood heights, increase erosion, or otherwise increase flood and erosion damages to public and private property.”<sup>34</sup>

In order to comply with possible property rights issues, the organization says “no adverse impact” regulations should:<sup>35</sup>

- Be applied fairly to all properties.
- Include a provision that would allow the agency to issue a permit in cases where a denial would deny a landowner of all economic use of the parcel.
- Adopt large lot zoning for floodplains which permits some economic uses, such as residential, on the upland parts of the lots.
- Allow for a transfer of development rights from floodplains to non-floodplain parcels.
- Reduce property taxes and sewer and water fees on regulated floodplains.

Christians, Montana’s former floodplain administrator, likes the “no adverse impact” approach. It allows for flexibility between different types of rivers across the diverse landscape of Montana, he said, and if somebody wants to raise the flood level on their own property, fine. But if the project raises the flood level downstream, it probably shouldn’t be built.

“You’re not telling people, ‘You can’t do that,’” Christians says. “You’re just using some common sense.”<sup>36</sup>

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<sup>34</sup> Government Liability and No Adverse Impact Floodplain Management. [www.floods.org](http://www.floods.org)

<sup>35</sup> Ibid.

<sup>36</sup> Karl Christians, interview, 5/16/2006.

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<sup>33</sup> [http://madison.mt.gov/departments/plan/current\\_proposals/July06PROPSubRegs.pdf](http://madison.mt.gov/departments/plan/current_proposals/July06PROPSubRegs.pdf)



# INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED, ALL ROOM DESIGNATIONS ARE IN THE CAPITOL

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
October 2006						
1	2	3	4	5	6	7
8	9	10	11 Legislative Finance Committee, Bulldog group on Corrections long- term solutions, Room 102, 1 p.m.	12 Legislative Finance Committee, Room 102, 8 a.m.	13 Legislative Finance Committee, Room 102, 8 a.m.	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
November 2006						
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15 Revenue and Transportation Com- mittee, Room 137	16	17	18
19	20	21	22	23	24	25
26	27	28 Legislative Finance Committee, Room 102, 8 a.m.  State Administration and Veterans' Affairs Committee	29 State Administration and Veterans' Affairs Committee	30		

LEGISLATIVE SERVICES DIVISION  
PO BOX 201706  
HELENA MT 59620-1706